IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8616 OF 2006

Madhav Yashwant Salokhe & Ors. .. Petitioners

Versus

Pundalik Shamrao Raut .. Respondent

Mr.Vinod Wagh with H.S.Venegavkar for petitioners

Mr.S.A.Jajeshirke with Surel Shah for respondent

CORAM : S.C.DHARMADHIKARI, J.

DATE : 10th December 2007

P.C.

. This is a petition challenging the order of the lower appellate court confirming that of the trial court.

2. By the order under challenge, the lower appellate court has confirmed the order of the trial court rejecting the application for setting aside an ex-parte decree which was preferred by the present petitioner under Order IX Rule 13 of the Code of Civil Procedure, 1908.

3. From a perusal of the order passed by the lower appellate court, it appears that the lower appellate court has discussed the merits of the matter and, thereafter, held that the application preferred by the present petitioner was not maintainable. If the lower appellate court was of the view that the application itself was not maintainable and the remedy of the petitioner lie somewhere else, then, it was not necessary for it to have gone into other aspects viz., whether sufficient cause was made out by the petitioner appellant for having the ex-parte decree set aside.

4. In the light of the rival contentions before me, so also reliance placed upon the decision of the Supreme Court in the case of Bhanukumar Jain Vs. Archana Kumar and Anr. reported in A.I.R. 2005 S.C.626 and several decisions including the decision in the case of Balu @ Madhavrao Shankarrao Ghorpade (deceased) by Lrs. Vs. Radhakkabai Panditrao RGhorpade, reported in 2004 (1) Mh.L.J.323, it would be appropriate if the matter is remitted to the lower appellate court for decision afresh. The lower appellate court to allow parties to make submissions on the issue of maintainability as also on merits and render its finding on the issue of maintainability first. The lower appellate court also to keep in mind the observations also the conclusions of the Supreme Court in the above referred decisions.

5. All contentions of both sides are expressly kept open. The order under challenge

is set aside and the appeal preferred being Misc.Civil Appeal no.125 of 2005 by the petitioners is restored to the file of Lower appellate court for being heard afresh as expeditiously as possible and in any event within four months from the date of receipt of copy of this order. Petition disposed of.

(S.C.Dharmadhikari, J)